80-291

Supreme Court, U. S.
FILED
AUG 12 1980
MICHAEL RODAK, JR., CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RONALD C. MILLER,
Petitioner.

v.

JANET C. MILLER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

ROBERT J. EMMONS, ESQ.
608 Strain Building
Great Falls, Montana 59401
(406) 761-7150

THOMAS E. BOLAND, ESQ.
600 Central Plaza
Suite 312
Great Falls, Montana 59401
(406) 453-3369

Counsel for Petitioner

Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTIONS PRESENTED FOR REVIEW

The over-all question presented is:

MAY STATE COURTS IN DIVORCE ACTIONS TREAT OR REGARD MILITARY PAY BENEFITS OF ONE SPOUSE AS "PROPERTY" OF THAT SPOUSE SO AS TO BE THE SUBJECT OF A DIVISION OF MARITAL ASSETS OF THE PARTIES IN AN ACTION TO DISSOLVE THE MARRIAGE?

Embraced within the general question are a number of subsidiary questions:

1. HAS THE UNITED STATES PREEMPTED THE FIELD AS TO THE CLASSIFICATION OF SUCH BENEFITS BY VIRTUE OF LEGISLATION OF THE CONGRESS OF THE UNITED STATES, SO THAT THE STATES ARE PRECLUDED BY VIRTUE OF ARTICLE VI, PARAGRAH 2, FROM TREATING SUCH BENEFITS AS "PROPERTY?"
2. UNDER APPLICABLE FEDERAL LAWS, MAY A TRIAL COURT PROVIDE THAT IN THE EVENT OF THE DEATH OF THE "CIVILIAN" EX-SPOUSE BEFORE THE "MILITARY" EX-SPOUSE, THE SURVIVING "MILITARY" EX-SPOUSE SHALL REMAIN OBLIGATED TO PAY ON SAID BENEFITS TO THE ESTATE OR HEIRS OF THE DECEASED EX-SPOUSE?
3. ARE THE TAX CONSEQUENCES OF SUCH A DECISION, DIVIDING SUCH BENEFITS AS "PROPERTY" SUCH AS TO RESULT IN A DENIAL OF EQUAL PROTECTION OF THE LAWS?

TABLE OF CONTENTS

ITEM	Page
Index of Authorities	iii - v
PETITION FOR WRIT OF CERTORARI	1
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED FOR REVIEW	3
APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS	4
1. Constitutional Provisions	4
2. Statutes	4
STATEMENT OF THE CASE	5
1. Where Issues Raised	5
2. Statement of the Facts	5
ARGUMENT	7
1. Reasons for the Granting of the Petition	7
a. Conflicting Opinions	7
1) Federal Authorities	7
2) Community Property States	9
3) Non-Community Property States	10
b. Change in Nature of both Military and Domestic Status of men and Women	11
c. Tax Consequences	11
2. On the Law	12
CONCLUSION AND RELIEF REQUESTED	16
APPENDIX A Findings of Fact, Conclusions of Law and Judgment of Trial Court, October 31, 1978	1a
APPENDIX B Amended Findings of Fact, Conclusions of Law and Judgment of Trial Court, November 29, 1978	14a
APPENDIX C Opinion of the Montana Supreme Court, March 27, 1980	16a

APPENDIX D.....23a
Order Denying Petition for Rehearing, and Remittitur, May 14, 1980
APPENDIX E.....25a
Rules 34 and 35, Montana Rules of Appellate Civil Procedure
APPENDIX F.....26a
Applicable Federal Statutes
APPENDIX G.....41a
Petitioner's Proposed Findings of Fact, Conclusions of Law and Judgment (Applicable Excerpts)
APPENDIX H.....43a
Petitioner's Post Trial Motions (Applicable Excerpts)
APPENDIX I.....53a
Specification of Errors in Petitioner's Brief to the Montana Supreme Court
APPENDIX J.....54a
Excerpts from "Army Echoes," May/June, 1980

INDEX OF AUTHORITIES

CASES: Page

Cook v. Cook, 495 P. 2d 591 (Mont. 1972).....10
Cose v. Cose, 592 P. 2d 1230 (Alaska, 1979).....11, 15
Ellis v. Ellis, 538 P. 2d 1347 (Colo. App., 1975), aff. 522 P. 2d 506 (Colo., 1976).....10
Ex Parte Johnson, 591 S.W. 2d 453 (Tex., 1980).....10
Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S. CT. 802, 59 L. Ed. 2d 1 (1979).....8, 9, 10, 13-14, 15,
Hostinsky v. United States, 292 F. 2d 508 (Ct. Cl. 1961).....10
In re Marriage of Fithian, 111 Cal. Rep. 369 (Cal., 1974).....10, 13
In re Marriage of Nizenkoff, 135 Cal. Rep. 189 (Cal. App. 1976).....9
Kruger v. Kruger, 373 A. 2d 659 (N.J., 1977).... 11, 13
Lambros v. C.I.R., 459 F. 2d 69 (6th Cir., 1972.....12
Lynch v. United States, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934).....8
Milhan v. Milhan, 158 Cal. Rep. 523 (Cal. App. 1979).....9
Savage v. Savage, 374 N.E. 2d 536 (Ind. App. 1978).....10
United States v. Smith, 393 F. 2d 318 (5th Cir. 1968).....8
United States v. Williams, 594 F. 2d 314 (2d Cir. 1979).....8
United States v. Williams, 370 A. 2d 1134 (Md. App., 1977).....10
Watson v. Watson, 424 F. Supp. 866 (D.C.N.C., 1976).....8-9
Wissner v. Wissner, 338 U.S. 655, 70 S. Ct. 398, 94 L. Ed. 424 (1950).....14
Wright v. C.I.R., 543 F. 2d 593 (7th Cir., 1976).....12

Page

CONSTITUTION FOR THE UNITED STATES:
Article I, Section 8 15
Article VI, Paragraph 2 4
Amendment XIV 4

STATUTES:
United States Code:
10 U.S.C., §1401 . . . . . 4, 6
10 U.S.C., §1402 4
10 U.S.C., §1431 4
10 U.S.C., §1434 4
10 U.S.C., §1440 . . . . . 4, 14
10 U.S.C., §1447 . . . . . 4, 6, 13, 14
10 U.S.C., §1448 4
26 U.S.C., §61 . . . . . 4, 12
26 U.S.C., §71 . . . . . 4, 12
28 U.S.C., §1257 (3) 2
37 U.S.C., §701 9
42 U.S.C., §659 . . . . . 4, 15
42 U.S.C., §662 . . . . . 4, 15

Montana Code Annotated, 1979:
§40-4-202 11
§40-4-203 11

RULES OF THE UNITED STATES SUPREME COURT
Rule 19 (a) (1) 2

Page

MONTANA RULES OF APPELLATE CIVIL PROCEDURE:
Rule 34 2
Rule 35 2

SECONDARY AUTHORITY:
"Army Echoes" May/June, 1980 9

IN THE

Supreme Court of the United States

October Terms, 1980

No.——

Ronald C. Miller, *Petitioner,*

—vs—

Janet C. Miller, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

COMES NOW, RONALD C. MILLER, and petitions the Honorable, the Supreme Court of the United States, for a Writ of Certiorari to review the judgment of the Supreme Court of Montana in the cause of *Ronald C. Miller vs. Janet C. Miller*, Cause Nos. 14636 and 14726, upon the Issues hereinafter set forth.

OPINION BELOW

The Findings of Fact, Conclusions of Law, and Judgment of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, were made and entered on or about the 31st day of October, 1978, and are not reported. A copy thereof is printed in Appendix A hereto, starting at Page 1a. Thereafter the Trail Court, on or about November 29, 1978, made and entered Amended Findings of Fact, Conclusions of Law, and Judgment, which are not reported. A copy thereof is printed in Appendix B hereto, starting at Page 12a. Thereafter timely appeal was taken to the Supreme Court of the State of Montana. The Opinion of the Montana Supreme Court was made and filed March 27, 1980. This Opinion is not yet officially reported, but is found at 609 P. 2d 1185 (Mont. 1980). A copy thereof is printed in Appendix C hereto, starting at Page 14a. Timely Motion for Rehearing was made pursuant to Rules 34 and 35, Montana Rules of Appellate Civil Procedure (printed as Appendix E hereto, starting at Page 23a. The Petition for Rehearing was denied, and Remittitur issued on May 14, 1980. A copy of the Order Denying Petition for Rehearing and Remittitur is printed as Appendix D hereto, starting at Page 21a.

JURISDICTION

The Order Denying Petition for Rehearing in the Montana Supreme Court of the Opinion entered March 27, 1980, which is the Opinion sought to be reviewed, was entered on May 14, 1980, whereupon said Opinion became final. This Petition will be filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 USC § 1257 (3), and, further, under Rule 19 (a) (1) of

the Rules of the United States Supreme Court, the Montana Supreme Court having decided a federal question of substance not theretofore determined by the Supreme Court of the United States, or has decided such question is a way not in accord with the applicable decisions of this Court.

QUESTIONS PRESENTED FOR REVIEW

The over-all question presented is:

MAY STATE COURTS IN DIVORCE ACTIONS TREAT OR REGARD MILITARY PAY BENEFITS OF ONE SPOUSE AS "PROPERTY" OF THAT SPOUSE SO AS TO BE THE SUBJECT OF A DIVISION OF MARITAL ASSETS OF THE PARTIES IN AN ACTION TO DISSOLVE THE MARRIAGE?

Embraced within the general question are a number of subsidiary questions:

1. HAS THE UNITED STATES PREEMPTED THE FIELD AS TO THE CLASSIFICATION OF SUCH BENEFITS BY VIRTUE OF LEGISLATION OF THE CONGRESS OF THE UNITED STATES, SO THAT THE STATES ARE PRECLUDED BY VIRTUE OF ARTICLE VI, PARAGRAH 2, FROM TREATING SUCH BENEFITS AS "PROPERTY?"
2. UNDER APPLICABLE FEDERAL LAWS, MAY A TRIAL COURT PROVIDE THAT IN THE EVENT OF THE DEATH OF THE "CIVILIAN" EX-SPOUSE BEFORE THE "MILITARY" EX-SPOUSE, THE SURVIVING "MILITARY" EX-SPOUSE SHALL REMAIN OBLIGATED TO PAY ON SAID BENEFITS TO THE ESTATE OR HEIRS OF THE

DECEASED EX-SPOUSE?

3. ARE THE TAX CONSEQUENCES OF SUCH A DECISION, DIVIDING SUCH BENEFITS AS "PROPERTY" SUCH AS TO RESULT IN A DENIAL OF EQUAL PROTECTION OF THE LAWS?

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Constitutional Provisions:

Constitution for the United States:

"This constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges of every state shall be bound thereby . . ."

(Articcle VI, Paragraph 2).

"1. . . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

(Amendment Fourteen).

2. Statutes:

The Statutes here cited are quoted in Appendix F, printed hereafter, starting at Page 24a.

a. 10 U.S.C. §1401
b. 10 U.S.C. §1402
c. 10 U.S.C. §1431
d. 10 U.S.C. §1434
e. 10 U.S.C. §1440
f. 10 U.S.C. §1447
g. 10 U.S.C. §1448
h. 26 U.S.C. §61
i. 26 U.S.C. §71
j. 42 U.S.C. §659
k. 42 U.S.C. §662

STATEMENT OF THE CASE

1. Where Issues Raised:

This action arose on a Petition for Dissolution of Marriage, and for Division of Property. The pleadings in the action did not detail the property. At the several hearings on the matter, the question was presented as to the status of Petitioner's Military Retirement Benefits. Petitioner at that time asserted that these Benefits were not property and could not be considered as such. The issues was raised in the Trial Court by Petitioner as follows:

a. By his Proposed Findings of Fact, Conclusions of Law, and Judgment dated September 25, 1978. Pertinent portions of the Proposed Findings are printed herewith as Appendix G, starting at Page 41a.

b. By the Briefs of Counsel in the Trial Court.

c. By Post Trial Motions, dated November 13, 1978. Pertinent portions of these Motions are printed herewith as Appendix H, starting at Page 43a.

And on Appeal by Specification of Error and Argument thereon in Petitioner's Brief to the Supreme Court of the State of Montana, and a copy of the pertinent Specifications are printed herewith as Appendix I, starting at Page 53a.

2. Statement of the Facts:

This Petition arises out of the Petitioner's Petition in the Trial Court for a dissolution of marriage and for other relief. Issue was joined, and a dissolution of marriage was ordered, from which neither party took any appeal. By stipulation, hearing was deferred on

the questions of maintenance of Mrs. Miller, property division, and attorney fees. Hearing was had on these issues in September, 1978, and on October 31, 1978, a judgment was entered, which included a division of Mr. Miller's Military Retirement Benefits, giving Mrs. Miller, as her "property" 38.5% thereof, the Court declaring that the award was "of a property interest to which Defendant (Mrs. Miller) is entitled, and not as spousal maintenance." The Conclusion of Law in question, October 31, 1978 Judgment (Appendix A) continued:

> ". . . However, the Court concluded that upon the death of Plaintiff (Mr. Miller), the availability of the pension, insofar as Defendant is concerned, will terminate and Plaintiff's obligation to pay 38.5 percent of his military pension to Defendant will terminate at that time. *In the event of Defendant's death before Plaintiff's death, the Plaintiff shall remain obligated to pay 38.5 percent to Defendant's estate or her heirs.* (Conclusion No. 4; emphasis added).

This present Petition arises from the division so made of Mr. Miller's Military Benefits.

The parties were married May 8, 1959, at a time when Mr. Miller was in the United States Air Force. Prior to his retirement in 1974, Mr. Miller had reached the rank of Lieutenant Colonel. Upon retirement he received benefits under 10 U.S.C. §1401 *et seq.*, and he participated in the Survivor Benefit Plan of 10 U.S.C. §1447 *et seq.* Of the two children of the marriage, the daughter had reached 18, and the son was placed, by agreement, with Mr. Miller. Mr. Miller was at the time 45, Mrs. Miller, 42. Both had substantial education,

with Mrs. Miller being a qualified teacher who had returned to school to study sociology. Mr. Miller was a career pilot, flying some 100 reconnaissance missions in North Vietnam, and receiving numerous decorations. After his retirement, he was employed by a local bank, with a then current gross salary of $12,000.00. He has remarried since the dissolution decree became final.

The Transcript of the Evidence in the Trial Court will be filed herewith. At page 552 thereof, the Court, in answer to Mr. Miller's arguments on the issue of Federal Preemption, again iterated that he regarded the benefits as a "property interest," and, at page 558 of the Transcript said:

> "Well, I was going to say here that I ruled on this thing as being a marital asset, and, of course, as a property interest, but I am well aware that there will probably be a tax consequence."

However, neither the Trial Court, nor the Montana Supreme Court, gave any practical consideration to the tax questions.

ARGUMENT

The question may be considered together, we believe. We submit that a State Court has no power or authority to award any portion of a Military Benefit earned by one spouse to the other spouse as a "property interest."

1. *Reasons for the Granting of the Petition for Certiorari:*

a. *Conflicting Opinions:*

1) *Federal Authorities:*

For reasons to be discussed hereafter, we believe

Hisquierdo vs. Hisquierdo, 439 U.S. 572, 99 S. Ct. 802. 59 L. Ed. 2d 1 (1979), is controlling. However, we believe that the conflict in the decisions, without regard to *Hisquierdo*, is such that the time is ripe for the Supreme Court to resolve the question.

If the matter is to be controlled by the Federal decisions as to the nature of a military "pension," it is clear that such military benefits are not "earned property rights" at all, but an emolument of office, derived from an act of Congress, and is in part based upon the military member's obligation to remain subject to recall to the service.

Watson vs. Watson, 424 F. Supp. 866, 868-869 (D.C.N.C. 1976). Justice Brandeis in *Lynch vs. United States*, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434, 1439 (1934) said:

> ". . . Pensions . . . are gratuities. They involve no agreement of the parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress."

We believe that all of the federal cases are to the same effect: a military pension does not vest; it is not property; it is wages.

United States vs. Williams, 594 F. 2d 314 (2d Cir.. 1979).

Thus we have a conflict between the States and the Federal Government and, as held in *United States vs. Smith*, 393 F. 2d 318 (5th Cir. 1968), when the State Court says that half of retirement pay is to go to the wife, there is a conflict between the Federal and State laws, the United States is not bound by the State ruling. The Federal laws, there the anti-assignment provisions

of 37 U.S.C., §701, preempted the field.

The conflict, then, between States which allow a "property division" here, and the apparently unanimous Federal cases which say that retirement benefits are not property.

The Montana Supreme Court did not seem to feel that the fact that Mr. Miller could be recalled to active service should be given much weight, in spite of the ruling of *Watson vs. Watson*, 424 F. Supp. 866 (D.C.N.C. 1976), and *Hostinsky vs. United States*, 292 F. 2d 508 (Ct. Cl. 1961). But such recall which the Montana Court thought could only result from "an extraordinary chain of events," is becoming quite probable. There is attached as Appendix J, Page 54a, an excerpt from "Army Echoes," for May/June, 1980, indicating a test program for recall of army retirees. Increased concern over world tensions has led to revival of registration. The "extraordinary chain" may well be tightening. Moreover, the fact remains, that Mr. Miller receives his benefits, in part, because he remains liable to recall.

2. *Community Property States:*

While, before the *Hisquierdo* decision, community property states generally felt they could treat the "benefits" as a property interest, some, at least, are now taking a second look. A California Court of Appeals decided *Milhan v. Milhan*, 158 Cal. Reptr. 523 (Cal. App. 1979), looking at the Social Security Act provisions to which Mr. Miller directed the Montana Court's attention, that Federal law did preempt the field. The case is now before the California Supreme Court, and we are informed that it was to be argued on June 12, 1980.

The correct view, even in community property

states, is that stated in *In re Marriage of Nizenkoff*, 135 Cal. Rep. 189, 190 (Cal. App. 1976), in which the Court, citing other California authority, including *In re Marriage of Fithian*, 111 Cal. Rep. 369 (Cal. 1974), said:

> "It is now well settled in this state that in order to qualify as a divisible community asset, an interest must be a contractual right or property interest. A pension right becomes a property interest when the employer cannot unilaterally repudiate the right."

But, by that definition, military retirement benefits are clearly not "property interests."

Texas, too, appears to be having second thoughts.

Ex Parte *Johnson*, 591 S.W. 2d 453, 456 (Tex. 1980), where the Texas Supreme Court held that *Hisquierdo* governed because, as with Railroad Retirement, Congress could at any time eliminate veterans' disability benefits.

However, it is generally true that community property states have treated retirement benefits as "property."

3) *Non-Community Property States:*

Here the cases are in conflict, although we believe that the majority follow the Federal rule. Montana is not a community property state.

> *Cook vs. Cook*, 495 P 2d 591, 159 Mont. 98 (1972).

United States vs. Williams, 370 A. 2d 1134, 1136-1137 (Md. App. 1977) (and cases cited).

Savage vs. Savage, 374 N.E. 2d 536, 538-539 (Ind. App. 1978).

Ellis vs. Ellis, 538 P. 2d 1347 (Colo. App. 1975), aff. 552 P. 2d 506 (Colo. 1976).

Cose vs. Cose, 592 P. 2d 1230 (Alaska, 1979), petition for cert. pending.

We submit that all of the considerations which led this Honorable Court to assume jurisdiction and to decide *Hisquierdo* apply here.

b. *Change in Nature of both Military and Domestic Status of Men and Women:*

Attitudes toward the entire realm of alimony, property rights, and—importantly—military status of both men and women are rapidly changing. No longer is alimony (or a share in marital property) a right merely to be asserted by the wife against the husband. Under Montana's statutes, for example, given the proper showing, maintenance may be granted "either spouse."

Section 40-4-203, M.C.A., 1979.

And the property rights of both spouses must be determined.

Section 40-4-202, M.C.A., 1979.

Gone, too, are the days when women in the military consisted of nurses and a few members of the Auxiliary Corps of the various services. Now women officers are being produced by the military service must include both men and women. The determination of the status of retirement benefits is of interest to both men and women as direct recipients of the benefits. With the fact that women out-live men, women should be even more concerned than their masculine military counterparts with the effect of the Montana decision, which would result in a woman retiree perhaps paying her ex (and now deceased) husband's second wife and children totally unrelated to her.

c. *Tax Consequences:*

In another of Mrs. Miller's cases, also relied upon by the Montana Supreme Court in another aspect, *Kruger vs. Kruger*, 373 A. 2d 659 (N.J. 1977), held that

the Trial Court must consider the tax aspects of the property division. While this matter was presented to the Montana Supreme Court herein, that Court simply ignored the question; the Trial Court was aware of it, but also did not deal with it.

At the heart of this question is the status of the award to Mrs. Miller. Is it income to her under 26 U.S.C. §61, or does it fall under the property settlement provisions of 26 U.S.C. §71? If the latter, it is not deductible by the husband nor included as income to the wife.

Lambros vs. C.I.R., 459 F. 2d 69, 71-71 (6th Cir. 1972).

cf. Wright vs. C.I.R., 543 F. 2d 593, 597 (7th Cir. 1976). So, the husband may deduct payments only if they are by way of maintenance, and not if they are for property settlement, and here the Court made it very clear the distribution was a division of property.

Mrs. Miller, then, receives "property." In the ordinary course of events had Mrs. Miller received real or personal property upon which taxes must be paid, she would be obligated to pay her share of such taxes. But here, the entire burden falls upon Mr. Miller. The tax is withheld at the source, and, under the Federal cases already cited, the Federal Courts will not recognize his right to recover back any of that withholding. There has been a denial of equal protection of the laws.

2. *On the Law:*

We believe the cases already cited indicate that the Federal authorities have preempted the field. The statutory aspects of the case will be mentioned shortly. But we must mention one aspect of the case here that is different from the other cases, and in which even the

community property states recognize that the field is preempted.

In the present case, Mr. Miller must continue the payments, should he survive his ex-wife, to her estate and her heirs. Thus she is placed in a position in which she can arrange for payments to total strangers. Although under the provisions of 10 U.S.C., §1447 *et seq.*, the benefits in any event would cease upon Mrs. Miller's death, the Montana court merely said that it could find no basis to distinguish the wife's interests "from other marital assets." The Court cited *Kruger vs. Kruger*, 373 A. 2d 659 (N.J., 1977), which did not even consider Sections 1401 or 1447 and following. However, one of the major cases upon which Mrs. Miller relied in the Montana courts, *In re Marriage of Fithian*, 111 Cal. Rep. 369 (Cal. 1974), does, and says: that there was no conflict between California and Federal law because "the pension terminates with the death of the husband, *and wife's share also terminates if she predeceases the husband.*" (111 Cal. Rep. at 374; emphasis added).

Hisquierdo vs. Hisquierdo, 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d1 (1979), not only sets forth the reasons why *certiorari* should be granted here, it also establishes that the Montana Supreme Court should be reversed.

While there the Railroad Retirement Act was at issue, the California Courts therein had based their decisions upon State cases involving military pensions, showing that State's awareness of the similarity of the laws and questions involved. *Hisquierdo* is based upon principles of law which had already been applied by the Federal courts to military pensions and to "non-vested" rights in general. In addition to the cases

already cited, a controlling decision is *Wissner vs. Wissner*, 338 U.S. 655, 70 S. Ct. 398, 94 L. Ed. 424 (1950).

The retirement benefits under the Railroad Retirement Act are of the same order as those here involved; as said in *Hisquierdo:* "Like Social Security and unlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, and even eliminate them at any time."

This is precisely true of military pensions. There is also an interesting question: what would happen should Mr. Miller be recalled? During his new tour of duty, the retirement benefits would cease. What, then, of Mrs. Miller's "property?" It would have ceased to exist.

In *Hisquierdo* the Court referred to the anti-garnishment and assignment provisions of the Railroad Retirement Act. 10 U.S.C. §1440 also militates against levies, garnishments, attachments and the like. 10 U.S.C. §1450 is to the same effect. The *Hisquierdo* Court then referred to the Social Security Act, and this Act should dispose of the whole question of Congressional intent. The military retirement statutes are, essentially, silent on the question of the rights of a divorced spouse. As pointed out in *Cose vs. Cose*, 592 P. 2d 1230, 1231-1232 (Alaska, 1979), some indications of Congressional intent can be gathered from the fact that under 10 U.S.C. §1447 *et seq.*, only a widow, not an ex-spouse is eligible, and when the bill was before Congress, provisions which would have protected the ex-spouse were stricken.

At 59 L. Ed. 2d 11, the *Hisquierdo* Court points out that the Railroad Retirement Act has "federal overtones." In view of the Constitutional Provisions that

Congress has the power to raise and support armies and to make rules for the government and regulations thereof (Article I, Section 8), certainly military retirement has "federal overtones." Further, all the money for such benefits is paid by Federal tax revenues.

In the Montana Courts we called attention to provisions of the Social Security Act, also relied upon in *Hisquierdo*. The Alaska Court in *Cose*, also relied upon the same provisions. So 42 U.S.C. §659 would permit garnishment for an obligation by a military retiree to pay child support or alimony, but alimony is expressly limited:

> ". . . Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable division of property, or other division of property between spouses or former spouses."
>
> 42 U.S.C., §662 (c).

Thus, there is a clear Congressional statement that "property divisions" are excluded. 42 U.S.C., §662 (f) (2) defines "remuneration for employment" as including any pension or retirement plan created by "any . . . system or fund established by the United States," which, therefore, includes military benefits. And, as to taxes, 42 U.S.C., §662 (g) provides that taxes are first to be deducted.

Hisquierdo is not distinguishable from the present case. The Montana Supreme Court simply chose to ignore the expressly applicable provisions of the Social Security Act when discussing *Hisquierdo*.

It is evident that the question of the status of military retirement benefits is more and more involving

the Courts. It is presently in the interest of the Courts and prospective litigants, that the the Supreme Court resolve the issues with a definitive ruling.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Petitioner, RONALD C. MILLER, respectfully requests that the Court grant this Petition for a Writ of Certiorari to review the Montana Supreme Court decision in this cause.

Respectfully submitted,
ROBERT J. EMMONS
By ORIGINAL signed by Robert J. Emmons
Attorney for Petitioner
608 Strain Building
Great Falls, Montana 59401
(406) 761-7150

DATED this 8 day of August, 1980.

STATE OF MONTANA)
: ss.
County of Cascade)

ROBERT J. EMMONS, being first duly sworn upon his oath, deposes and says:

That he is the attorney for the Petitioner, RONALD C. MILLER, in the above entitled matter.

That on August 8, 1980, affiant personally served Mr. David Hopkins of the Firm of MARRA, WENZ, IWEN, JOHNSON & HOKPINS, counsel for the Respondent, JANET C. MILLER, three (3) correct and true copies of the "Petition for a Writ of Certiorari to the Supreme Court of Montana" as counsel for RONALD C. MILLER, Petitioner.

This Proof of Service is made pursuant to Rule 33 (3) (c) of the Rules of the United States Supreme Court.

ORIGINAL signed by
Robert J. Emmons

ROBERT J. EMMONS

SUBSCRIBED AND SWORN to before me this 8 day of August, 1980.

/s/ Janet E. Hunt

(NOTARIAL SEAL) Notary Public for the State of Montana Residing at Great Falls, Montana. My Commission expires: 10-11 1982.

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

IN RE THE MARRIAGE OF: RONALD C. MILLER, *Petitioner,* and JANET C. MILLER, *Respondent.*	No. 84025 A **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT.**

The above-entitled matter came on for hearing before this Court during three separate sessions conducted on September 13, 1978, September 14, 1978, and September 15, 1978. The Petitioner, Ronald C. Miller, appeared in person and by his attorney, Robert J. Emmons. The Respondent, Janet C. Miller, appeared in person and by her attorneys, Warren C. Wenz and David A. Hopkins. Upon the presentation of the evidence presented by both parties, this Court has been fully advised in the premises and hereby makes the following:

FINDINGS OF FACT

1. Plaintiff and Defendent were married May 8, 1959, in Goose Bay, Province of Labrador, Canada. Said marriage was terminated by a Decree of Dissolution entered by the above Court on February 8, 1978. The issues of spousal maintenance, child custody, child support, division of property, and attorneys fees were unresolved at the time of the dissolution subject to subsequent hearings which have now been held.

2. By stipulation of the Plaintiff and Defendant, through their respective attorneys, at the hearing on September 13, 1978, the issues of child custody and child support had been resolved. Pursuant to said stipulation the Court finds that the daughter of the parties, Susan L. Miller, became 18 years of age on September 17, 1978, and that Plaintiff paid child support for her up to her 18th birthday and consequently there is no necessity to award custody or support with regard to Susan.

The only other child of Plaintiff and defendant is Ronald R. Miller, born March 15, 1963, now 16 years of age. Pursuant to the stipulation of the parties, the Court finds that the best interests of Ronald would be served by awarding the care, custody, and control of him to Plaintiff, with Plaintiff to provide for his support, and with the right of reasonable visitation granted to Defendant.

3. Plaintiff was born November 18, 1932, and is now 45 years of age. He was born and raised in Pennsylvania, earned a college scholarship in athletics, worked part time while in college, and graduated from college in June, 1954. Upon graduation from college, Plaintiff entered the United States Air Force, became a pilot, and served on active duty for 20 years, retiring in October, 1974, as a Lieutenant Colonel. At the time of his marriage to Defendant on May 8, 1959, Plaintiff was a First Lieutenant. He was promoted to Captain in 1960, to Major in 1966, and to Lieutenant Colonel in 1971.

4. During the 20 years of active duty, Plaintiff was stationed at Goose Bay, Labrador; in Florida; in New York; in Vietnam; in Glasgow, Montana; and at Malmstrom Air Force Base in Great Falls, Montana from where he retired. During the years of the military marriage, i.e., from May 1959, until retirement in 1974, the Plaintiff and Defendant moved 12 times. Plaintiff

was awarded several medals during his military career, and flew 100 missions in an unarmed reconnaissance plane over North Vietnam from 1967 to 1968. His accomplishments as a career air force officer are evidenced by his progressive promotions to higher rank.

5. Immedately upon retirement from the Air Force, i.e., in November 1974, Plaintiff was employed by the Northwestern Bank in Great Falls, Montana, in the marketing division and is presently so employed. His annual gross salary at the time of his employment was $8,700.00. He has received approximately four salary increases since November, 1974, so that his present annual gross salary is approximately $12,000.00.

6. Plaintiff remarried on March 24, 1978, and is presently residing in Great Falls with his present wife and his son Ronald. Plaintiff is an intelligent person, strong, vigorous, and in good health.

7. Defendant was born February 20, 1936, and is now 42 years of age. She was born and raised in Canada, attended and graduated from college in Canada and obtained a teaching certificate there. She was teaching school in Goose Bay, Labrador, when Plaintiff and Defendant were married in May, 1959. Daughter Susan was born in September, 1960, and son Ronald was born in March, 1962.

8. During the marriage years, i.e. from May, 1959, until February, 1978, the Defendant was employed as a substitute teacher in England during 1967 to 1971, teaching approximately two days per month at the school on the Air Base; she was a substitute teacher in Great Falls, Montana during 1971 to 1974, called more frequently during the 1973 to 1974 school year; she taught full time during the 1974 to 1975 school year at the longfellow School (6th grade) in

Great Falls; she did little substitute teaching after 1975 and her Montana teaching certificate lapsed in June, 1978. She worked part time as a clerk for Montgomery Wards about the time of the separation of the parties in September 1977 for a few months earning less than $50.00 per week. On November 9, 1977, she was employed by the Urban 4-H University Extension Service, earning a gross of $361.00 and a net of $293.00 per month until September 8, 1978, when she terminated that employment to enter the University of Montana. Defendant's income during the marriage and up until the separation was used for family expenses.

9. defendant is presently enrolled at the Universiy of Montana studying for a sociology degree which may take two years or longer to complete. Defendant and her daughter, Susan, are living together in Missoula, both attending the University of Montana. Defendant is an intelligent person, very articulate, and in good health.

10. During the years of marriage, Plaintiff and Defendant and their two children resided together at whatever air force base they were assigned, except for relatively brief periods when Defendant and the children resided with her parents in Canada when Plaintiff was in a combat zone and dependents were not allowed.

11. There was conflicting evidence presented relating to the parenting, housekeeping, cooking, wifely and career enhancing abilities of Defendant during the marriage. The Court finds from all the evidence presented on these matters that the Defendant was a good and faithful wife, a good mother to the two children, and maintained the various residences of the parties in a clean and well kept condition, prepared meals and washed clothes satisfactorily, and perfor-

med her duties as an officer's wife in entertaining at many and various social activities during Plaintiff's active duty career in addition to helping in organizing parties, tours, and classes and writing for a wives newsletter at the various air force bases, all said activities contributing favorably to Plaintiff's military career. The Court finds that Defendant's non-financial contribution as a homemaker and to the family unit was equal to the financial contribution made by the Plaintiff.

12. When Plaintiff and Defendant were married in 1959, Plaintiff owned an Oldsmobile car valued at about $2,000.00 and 16 acres of Pennsylvania unimproved mountain land which he had received from his grandfather of relatively insignificant value. Defendant contributed $1,500.00 cash from savings from her teaching income to the marriage. Either before or during the marriage, Defendant's father made a gift of some Canadian stock to Defendant which presently has a value of about $3,000.00 The Court finds that the original contribution of the parties to the marriage offset each other and that Plaintiff should be awarded the Pennsylvania land as his sole property and Defendant should be awarded the Canadian stock as her sole property.

13. During the nearly 19 year marriage (18 years and 9 months) the Plaintiff and defendant acquired the following assets which are subject to being divided by the Court:

Description		Value
a) Jointly owned residence at 513 52nd Street South, Great Falls, MT. Appraised market value as of August 31, 1978.	$64,500.00	$38,988.00
Less Balance due on mortgage	25,512.00	$38,988.00
b) Savings Bonds		2,600.00
c) Household furniture, furnishings and appliances.		8,400.00
d) 1975 Chevrolet truck		3,550.00
e) 1971 Oldsmobile car		600.00
f) 1970 Hornet car		500.00
g) 1968 12' aluminum boat, 9 h.p. motor, trailer		350.00
h) 1967 Golden Falcon trailer		1,000.00
i) 3 life insurance policies (children are beneficiaries)		
j) Northwestern Bank Pension and Profit Sharing Plan - balance on December 31, 1977		3,611.00
k) Coin collection		no value given
l) Life time military pension of Plaintiff		

14. Since retiring from active duty, Plaintiff is entitled to receive a life time military retirement which is paid monthly. At the time of the marriage dissolution, in February 1978, Plaintiff was receiving $1,190.70 gross per month as his military retirement pension. At the time of the hearing on the remaining issues, in September 1978, Plaintiff was receiving $1,219.28 gross per month. As of October 1, 1978, the Plaintiff's gross

monthly military pension is $1,279.02. Plaintiff's military pension increases periodically pursuant to the cost of living factor. Plaintiff has chosen an option under his military retirement plan to allow his surviving spouse to collect a reduced amount of his military pension in the event of his death. However, Plaintiff's present wife and Plaintiff must be married for one year or longer in order for that option to become effective. Since the dissolution of Plaintiff and Defendant's marriage, and up to one year after the marriage of Plaintiff and his present wife, if Plaintiff dies, no one will thereafter receive any of Plaintiff's military pension.

15. The Court finds that the Plaintiff and Defendant were married for 185 months of the 240 months during which Plaintiff was on active duty with the air force.

CONCLUSIONS OF LAW

1. Plaintiff should be awarded the care, custody, and control of Ronald R. Miller with the right of reasonable visitation granted to Defendant.

2. That all the items listed in paragraph 12 of the Findings of Fact are marital assets subject to being divided, as well as the Canadian stock and the Pennsylvania land described in Finding of Fact #11.

3. In disposing of property acquired during the marriage, Section 48-321, R.C.M., 1947, requires and the Court has considered these factors, to-wit:

(a) Duration of the marriage: Eighteen years and nine months.

(b) Prior marriage: None by either party.

(c) Antenuptial Agreement: None by either party.

(d) Age: He is 45 and she is 42.

(e) Health: Both enjoy good health.

(f) Station and Occupation: She is a college graduate as is he; she is a teacher by profession and Mr. Miller also has a teacher's certificate; he is a public relations man for a bank and she has decided to become a student for another two years to get a degree in sociology.

(g) Amount and source of income: His income has been set forth above. She has abandoned any efforts to obtain an income which she could derive from a teaching position in favor of returning to school.

(h) Vocational Skills: She can teach and he can also. Both have college degrees.

(i) Employability: He is employed. She could easily be employed as a teacher but has chosen not to do so. There is nothing standing in her way to obtain a job. However she elected to return to college to earn a degree in sociology.

(j) Estate: Neither one has any estate of their own.

(k) Liabilities: Both parties are liable on the note for the family residence. Mrs. Miller has no debts. Mr. Miller owes Ft. Sam Houston $450.00 and a small bill to MasterCharge. Debt-wise, they are in excellent condition.

(l) Needs of the parties: Mr. Miller has his regular expenses. He has paid the monthly mortgage payment while separated and with Janet Miller and the children living in the home. His monthly expenses now are:

(1) Mortgage payment	$ 309.00
(2) Utilities	90.00
(3) Insurance (policies for children)	93.00
(4) Clothing - his and his son's	60.00
(5) Car insurance, gas & upkeep (Ins.	

averaged for the year & applied each month. Youthful driver raises insurance.)	150.00
(6) Cleaning	15.00
(7) Allowance to Son	40.00
(8) Entertainment - his and his son's	20.00
(9) Food - his and Ronnie's	300.00
	$1,077.70

The food of $300.00 includes this expense for the present Mrs. Miller. With the exception of the food, the present Mrs. Miller pays for her own expenses from her income.

Mrs. Miller's expenses for herself while going to college are as follows:

(a) Rent per month	$127.00
(b) Utilities per month	30.00
(c) Food per month	75.00
(d) Clothing per month	40.00
(e) Laundry and dry cleaning per month	10.00
(f) Transportation per month	40.00
(g) Medical and dental per month	20.00
(h) Insurance per month	20.00
(i) Recreation - eating out	20.00
	$382.00

Her tuition per quarter is $204.50 or $818.00 for four quarters. She estimates her books cost per quarter at $100.00 or $400.00 for four quarters. Then quarterly expenses average $100.00 per month per year.

(m) Custodial provisions: Susan Miller is now an adult so her custody is not an issue. Ronald lives with his father and that is not an issue. Mr. Miller will have the food, clothing, allowance, gas for car operation, and insurance costs for a young driver to be paid by him.

(n) Opportunity for future capital acquisitions: With the exception of the bank pension plan, it does not appear Mr. Miller will acquire capital assets in the future. Nor does it appear Mrs. Miller will acquire future capital assets. His future income is tied to the bank income and his military pension. The latter has a cost of living increase each year. Her future income will depend on whether she teaches or is employed as a sociologist. The income for the latter occupation is unknown and there was no evidence as to what that occupation pays.

(o) Contribution to the Estates: Mr. Miller has made the principal financial contributions for the acquisition of the present assets. Mrs. Miller has contributed little financially to the assets now owned by them. There does not appear to be any dissipation of the estate by either party. They obviously lived within their means but expended the income.

(p) Wife's Contribution as a Homemaker or to the Family Unit: There was conflicting evidence presented relating to the parenting, housekeeping, cooking, wifely and career enhancing abilities of Defendant during the marriage. The Court finds from all the evidence presented on these matters that the Defendant

was a good and faithful wife, a good mother to the two children and maintained the various residences of the parties in a clean and well kept condition, prepared meals and washed clothes satisfactorily, and performed her duties as an officer's wife in entertaining at many and various social activities during Plaintiff's active duty career in addition to helping organizing parties, tours, and classes and writing for a wives newsletter at the various air force bases, all said activities contributing favorably to Plaintiff's military career. The Court finds that Defendant's non-financial contribution as a homemaker and to the family unit was equal to the financial contribution made by the Plaintiff.

(q) Other than the Pennsylvania land given to Plaintiff before the marriage, and the stocks given to Defendant by her father, there is no property acquired by gift, bequest, or devise.

4. The Court concludes that a fair and equitable division of the marital assets of the parties would be as follows:

TO PETITIONER

(a) One-half the net equity in the family residence.

(b) The color television set, refrigerator, and lawn mower.

(c) One-half of the Savings Bonds

(d) 1975 Chevrolet truck and 1970 Hornet car

(e) 1968 12' aluminum boat, 9 h.p. motor, and trailer

(f) 1967 Golden Falcon trailer

(g) Northwestern Bank Pension Plan

(h) Coin collection

(i) Life insurance policies to be maintained by Plaintiff with the children of the parties to remain as beneficiaries.

(j) Pennsylvania land

(k) That portion of Petitioner's military pension not awarded to Respondent.

TO RESPONDENT

(a) One-half the net equity in the family residence or a judgment in the amount of $19,494.00.

(b) All items of household furniture, furnishings, and appliances except the color television set, refrigerator, and lawn mower.

(c) One-half of the Savings Bonds.

(d) 1971 Oldsmobile car

(e) Canadian stock

(f) One-half of 185/240th or 38.5 percent of Plaintiff's monthly military pension, including any future increases in said pension, to be paid to Defendant as and when said monthly pension is received by Plaintiff for as long as Plaintiff lives. The Court considers this award to be of a property interest to which Defendent is entitled and not as spousal maintenance. However, the Court concludes that upon the death of Plaintiff, the availability of the pension, insofar as Defendant is concerned, will terminate and Plaintiff's obligation to pay 38.5 percent of his military pension to Defendant will terminate at that time. In the event of Defendant's death be-

fore Plaintiff's death, the Defendant shall remain obligated to pay said 38.5 percent to Defendant's estate or her heirs.

5. That Defendant is awarded sufficient property herein so that she can provide for her reasonable needs and furthermore Defendant has the ability to support herself through appropriate employment and consequently Defendant is not entitled to spousal maintenance.

6. Each party should pay his/her own attorneys' fees and costs herein.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court enters the following Judgment.

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiff is awarded the care, custody and control of Ronald R. Miller, the minor son of the parties, with the right of reasonable visitation granted to Defendant.

2. That the Plaintiff and Defendant are each awarded those items of property as set forth in Conclusion of Law #4.

3. Each party to pay his/her own attorney's fees and costs herein.

DATED this 31st day of October, 1978.

Joel G. Roth
District Judge

cc: David Hopkins
Robert Emmons

APPENDIX B

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

IN RE THE MARRIAGE OF Ronald C. Miller, *Petitioner,* and JANET C. MILLER, *Respondent.*	Cause No. 84025A **AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT**

On November 22, 1978, a hearing in the above-entitled matter was held in reference to the Petitioner's Motions to Amend Findings, to make additional Findings, to Amend the Judgment, to Alter the Judgment, and for a new trial. During the hearing, the Petitioner was represented by his attorney, Robert J. Emmons, the Respondent was represented by her attorney, David A. Hopkins.

Upon consideration of the various memorandums submitted by the respective parties and upon the oral arguments before this Court, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That Paragraph 2 of the Conclusions of Law shall be amended, *nunc pro tunc* to read as follows:

> "That all the items listed in Paragraph 13 of the Findings of Fact are marital assets subject to being divided, as well as the Canadian stock and the Pennsylvania land described in Finding of Fact 12."

2. That Paragraph 4 (a) of the Court's Conclusions of Law is hereby amended to read the following:

"That Petitioner shall be allowed a period of thirty days from November 22, 1978 within which to purchase the Respondent's net equity in the family residence in the amount of $19,494.00. In the event that Petitioner does not purchase Respondent's interest within said time period, said residence shall be sold within sixty days subsequent to November 22, 1978 and the Respondent shall be awarded the sum of $19,494.00 from the sale of the residence or one-half of the actual net equity in the family residence.

3. That except for the changes made in the preceding two paragraphs, the remainder of the Petitioner's Combined Motions are hereby denied.

DATED this 29th day of November, 1978.

District Judge

cc: David Hopkins
Robert Emmons

APPENDIX C

Nos. 14636 & 14726

IN THE

Supreme Court of the State of Montana

1979

IN RE THE MARRIAGE OR:
RONALD D. MILLER,

Petitioner and Appellant,

vs.

JANET C. MILLER,

Respondent and Respondent.

Appeal from: District Court of the Eighth Judicial District, Honorable Joel G. Roth, Judge presiding.

Counsel of Record:

For Appellant:

Smith, Emmons, Baillie and Walsh, Great Falls, Montana
Robert J. Emmons argued, Great Falls, Montana

For Respondent:

Marra, Wenz, Iwen and Johnson, Great Falls, Montana
David Hopkins argued, Great Falls, Montana

Filed: March 27, 1980

Submitted: November 5, 1979
Decided: March 27, 1980

Thomas J. Kearney *Clerk*

Mr. Justice Daniel J. Shea delivered the Opinion of the Court.

Husband, Ronald C. Miller, appeals the orders of the Cascade County District Court which granted the wife a 38.5 percent share in the husband's military pension and temporary maintenance during the pendency of this appeal.

The husband asserts that his military retirement pay is not a marital asset under Montana's Uniform Marriage and Divorce Act and in any event, that 10 U.S.C.A. §1401, *et seq.*, which would permit distribution of a property interest in military retirement pay to the retiree's spouse.

The primary issue in this appeal concerns the husband's military retirement pay. A United States Code provision provides that an officer of the armed forces who completes 20 years of service is entitled to retirement pay based upon the number of years he serves in the armed forces, and his rank at retirement. See 10 U.S.C.A. §1401, *et seq.* See also *Cose v. Cose* (Alaska 1979), 592 P.2d 1230; In *Re Marriage of Fithian* (Cal. 1974), 111 Cal. Rptr. 369, 517 P.2d 449. Benefits are paid monthly and terminate upon the serviceman's death. As of October 1, 1978, the husband here received $1,279.02 monthly retirement pay. The amount of his retirement pay is adjusted for changes in the cost of living.

The husband commenced this action on November 22, 1977 by filing a petition for divorce. The trial court granted the parties a divorce on February 8, 1978 and the following November entered its judgment granting custody of the parties' minor child to the husband, and distributing their property. The court's order further provided that neither party was entitled to maintenance

or attorney fees. The court amended its judgment on November 29, 1978 to allow the husband thirty days to purchase the wife's interest in their home. The husband filed his notice of appeal of the amended judgment on December 28, 1978. The husband also appealed the court's order of February 26, 1979 which granted the wife's motion for temporary maintenance pending the husband's appeal.

The husband and wife were married in 1959 and now are both in their middle to late forties. The husband served for 20 years in the United States Air Force and retired in 1974 with the rank of lieutenant colonel. Since his retirement, he has worked at Northwestern Bank in Great Falls, Montana, where he presently earns approximately $12,000 per year. The wife worked intermittently as a teacher during their marriage. Immediately prior to her divorce she was employed by the University Extension Service where she earned a gross of $361 a month. Presently she is a full time student at the University of Montana where she is completing courses toward a sociology degree. The parties at the time of the divorce decree had one minor child but custody and support are not at issue. The primary issues involve the disposition of the husband's military pension.

The pension is by far the greatest asset of the parties. According to evidence submitted by the wife, it has a present worth of $442,307. The trial court valued the parties net equity in the family home at $38,988 and the remainder of their real and personal property at approximately $20,000.

The court's order distributed half of the net equity of the home to each of the parties, divided the remainder of their real and personal property, and provided that the wife should have a 38.5 percent share in the

husband's military pension. The decree provided that the wife's share in the pension should be paid monthly as it was received by the husband. Furthermore, it provided that in the event the wife predeceased her husband, that the pension should pass to her estate. At the time of this appeal, the wife's share in the husband's pension amounted to $492 per month.

The husband contends that his right to receive the pension is not a vested right and therefore the wife has no right to receive a share of his pension as part of a marital property division. Courts cannot reach agreement as to whether a military pension is income or, on the other hand, a vested property right. See *Cose v. Cose, supra.* Courts finding that a military pension is income have analogized retirement payments to salary because retirement payments are paid monthly and are earned in the sense that the retiree remains a member of the armed forces and is subject to recall to active duty. In *Re Marriage of Ellis* (Colo. C.A. 1975), 36 Colo. App. 234, 538 P.2d 1347, affd. 191 Colo. 317, 552 P.2d 506; *Watson v. Watson* (E.D. N.C. 1976), 424 F. Supp. 866. Viewed realistically, however, the better view is that the retiree has "earned" his pension by his years of active duty in the service. See *In Re Marriage of Musser* (Ill. C.A. 1979), 70 Ill. App.3d 706, 388 N.E. 2d 1289; *Kruger v. Kruger* (N.J. 1977), 73 N.J. 463, 375 A.2d 659; *In Re Marriage of Ellis* (dissenting opinion), *supra; In Re Marriage of Fithian* (Cal. 1974), 517 P.2d 449, Ill Cal. Rptr. 369. After 20 years of active duty a person desiring to retire from the military is entitled to a pension. Under normal circumstances, a retiree does not have to perform any significant duties as a condition to receiving his monthly retirement check.

In the present case, at his retirement in 1974, the husband had the opportunity to enjoy a leisurely

retirement or assume a second career. He chose to become a full time employee at Northwestern Bank of Great Falls. He therefore, has two sources of income, one from his retirement pay, and another from his salary as a bank employee. Unless an extraordinary chain of events should arise, the husband will not be recalled to active duty. The husband's military retirement pay resembles an ordinary private pension, and just as a private pension, it should be treated as a vested property right which can be distributed as part of a court's property division.

The husband's second contention is that 10 U.S.C.A. §1401, *et seq.* preempts Montana's Uniform Marriage and Divorce Act insofar as it permits distribution of a property interest in his retirement pay. He relies on *Hisquierdo v. Hisquierdo* (1979), 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1. There, the United States Supreme Court held that treatment of a railroad pension receivable under the Railroad Retirement Act, 45 U.S.C. §231, *et seq*, as community property, violated the purpose of the Act and was prohibited by the supremacy clause. See also *Knudson v. Knudson* (1980), _____ Mont. _____, _____ P.2d _____, 37 St.Rep. 147. The husband argues that the relevant portions of 10 U.S.C.A. §1401, *et seq.* fovern-ing military pensions are analogous to the Railroad Retirement Act and therefore that the rationale of the Supreme Court's decision in *Hisquierdo* applies to the present case. The Railroad Retirement Act is however, explicit as to what happens to a railroad pension upon an absolute divorce.

The *Hisquierdo* decision was based on the broad language of §231 of the Railroad Retirement Act which protects the pensioner's benefits from "legal process

under any circumstances whatsoever." The Court noted that Congress had carefully targeted its benefits towards the working spouse by providing that the non-working spouse's "entitlement . . . to an annuity . . . shall end on the last day of the month preceding the month in which . . . the spouse and the individual are absolutely divorced." 45 U.S.C. §231d (d) (3). The Court stated that its decision might well have been different if Congress had not explicitly terminated a spouse's benefits upon absolute divorce. On the other hand, Chapter 71, 10 U.S.C.A. §1401, *et seq.*, which governs the husband's military pension does not contain any section similar to the provisions deemed controlling in the *Hisquierdo* decision. Chapter 71 does not protect a pensioner from attachment or other legal process, nor does it expressly provide that a wife's interest in her husband's pension shall terminate upon divorce. We cannot say that federal statutes directly or indirectly prevent the distribution made here. *Czarnecki v. Czarnecki* (Ariz. 1979), 600 P.2d 1098. Furthermore, we do not believe that the trial court's distribution to the wife goes contrary to the intent of Congress to promote continued service in the armed services by means of its military retirement plan. See *In Re Marriage of Musser, supra;* see also *Gorman v. Gorman* (Cal. C.A. 1979), 90 Cal.App.3d 454, 153 Cal.Rptr. 479. Congress must certainly have contemplated that the service people of this country would get married and therefore assume the duties and obligations of marriage.

Finally, the husband argues that it was error for the trial court to rule that heirs of the wife could inherit her interest in the military pension. We find no basis to distinguish the wife's interest from other marital assets which may be distributed by a trial court. See *Kruger v. Kruger, supra.* The court order

provides the wife's share in the husband's retirement will be taken out of his monthly payments as he receives them. The husband's obligation lasts only so long as he continues to receive government retirement benefits. Thus the heirs of the wife can share in these benefits only while the husband is living. We affirm the trial court's order in this respect.

We note here that the trial court awarded the wife $500 per month as temporary maintenance pending the husband's appeal. The amount of temporary maintenance order by the court is almost equal to the wife's share in the pension which she would have received had there been no appeal here. Since we affirmed the amended judgment, the wife will receive payment for her share of the pension which has accrued since the date of the amended judgment. In order to avoid a double payment to the wife, the trial court's award of temporary maintenance is vacated.

As modified, the amended judgment of the District Court is affirmed.

Daniel J. Shea
Justice

We Concur:

Frank I. Haswell
Chief Justice

Gene B. Daly

John C. Harrison

John F. Sheehy
Justices

APPENDIX D

STATE of MONTANA
OFFICE OF THE
CLERK

SUPREME COURT

Helena, Montana
May 15, 1980

THOMAS J. KEARNEY, Clerk

Florence McGiboney
Clerk of District Court
Great Falls, Montana 59401

RE: No 14636 and 14726, D.C. No 84025-A, *MILLER vs. MILLER*

Dear Mrs. McGiboney:

Enclosed please find remittitur and a copy of the Opinion in the above-entitled cause.

Best personal regards.

Very truly yours,
Thomas J. Kearney
Clerk of Supreme Court

cc: Smith, Emmons, Baillie and Walsh
Marra, Wenz, Iwen and Johnson

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 14636 &
14726

IN RE THE MARRIAGE OF:

RONALD C. MILLER,

Petitioner and Appellant,

and

JANET C. MILLER,

Respondent and Respondent.

ORDER

PER CURIAM:

Appellant's petition for rehearing is denied.
DATED THIS 14th day of May, 1980.

Frank I. Haswell
Chief Justice

John Conway Harrison

John C. Sheehy
Justices

APPENDIX E

APPLICABLE PORTION OF RULE 34, MONTANA RULES OF APPELLATE CIVIL PROCEDURE

"When in appeals or special proceedings, it is ordewred that remittitur . . . or judgment issue forthwith, no petition for rehearing will be entertained. In all other cases a petition for rehearing may be filed within 10 days after the decision of the Supreme Court has been rendered, unless the time is shortened or enlarged by order. . . ."

APPLICABLE PORTION OF RULE 35, MONTANA RULES OF APPELLATE CIVIL PROCEDURE

"(b) Remittitur may, in cases where it is deemed proper, be ordered forthwith; otherwise the same shall be issued promptly upon expiration of time for filing petition for rehearing, or, if such petition is filed, then upon denial thereof. . ."

APPENDIX F

APPLICABLE FEDERAL STATUTES

a. **10 U.S.C., §1401:**

"**Computation of retired pay:** The monthly retired pay of a person entitled thereto under this subtitle (10 USCS §§101 *et seq.)* is computed according to the following table. For each case covered by a section of this title (10 USCS §§1 *et seq.)* named in the column headed 'For sections', retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3 and 4, as modified by the applicable footnotes. However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or of any other provision of law, he is entitled to be paid under the applicable formula that is most favorable to him. Section references below are to sections of this title (10 U.S.C.S. §§1 *et seq.)*. (Tables omitted)."

b. **10 U.S.C.§1402:**

"**Recomputation of retired or retainer pay to reflect later active duty.** (a) A member of an armed force who has become entitled to retired pay or retainer pay, and who thereafter serves on active duty (other than for training), is entitled to recompute his retired pay or retainer pay upon his release from that duty as follows: (Tables and notes omitted). However, an officer who was ordered to active duty (other than for training) in the grade that he holds on the retired list under

former section 6150 of this title (former 10 USCS §6150), or under any other law that authorized advancement on the retired list based upon a special commendation for the performance of duty in actual combat, may have his retired pay recomputed under this subsection on the basis of the rate of basic pay applicable to that grade upon his release from that active duty only if he has been entitled, for a continuous period of at least three years, to basic pay at that rate. If, upon his release from that active duty, he has been entitled to the basic pay of that grade for a continuous period of at least three years, but he may have his retired pay recomputed under this subsection on the basis of the rate of basic pay replaced by those in effect upon his release from that duty."

c. **10 U.S.C. §1431:**

"Election of annuity: members of armed forces. (a) This section applies to all members of the armed forces except — (1) members whose names are on a retired list other than a list maintained under section 1376 (a) of this title (10 USCS §1376(a)); (2) cadets at the United States Military Academy, the United the United States Air Force Academy, or the Coast Guard Academy; and (3) midshipmen.

"(b) To provide an annuity under section 1434 of this title (10 USCS§1434), a person covered by subsection (a) may elect to receive a reduced amount of the retired pay or retainer pay to which he may become entitled as a result of service in his armed force. Except

as otherwise provided in this section, unless it is made before he completes nineteen years of service for which he is entitled to credit in the computation of his basic pay, the election must be made at least two years before the first day for which retired pay or retainer pay is granted. However, if, because of military operations, a member is assigned to an isolated station or is missing, interned in a neutral country, captured by a hostile force, or beleaguered or beseiged, and for that reason is unable to make an election before completing nineteen years of that service, he may make the election, to become effective immediately, within one year after he ceases to be assigned to that station or returns to the jurisdiction of his armed force, as the case may be. A member to whom retired pay or retainer pay is granted retroactively, and who is otherwise eligible to make an election, may make the election within ninety days after receiving notice that such pay has been granted to him. An election made after the date of enactment of this amendment (enacted Aug. 13, 1968) is not effective if—

(1) the elector dies during the first thirty-day period he is entitled to retired pay as a result of a physical condition which led to hisbeing granted retired pay under chapter 61 of title 10 (10 USCS§§1201 *et seq.*) with a disability of 100 per centum under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination of the per centum of his disability;

"(2) the disability was not the result of injury or disease received in line of duty as a direct result of armed conflict; and

"(3) his widow or children are entitled to dependency and indemnity compensation under chapter 13 of title 38 (38 USCS§§401 *et seq.*) based upon his death.

"(c) An election may be changed or revoked by the elector before the first day for which retired or retainer pay is granted. Unless it is made on the basis of restored mental competency under section 1433 of this title (10 USCS§1433), or unless it is made before the elector completes nineteen years of service for which he is entitled to credit in the computation of his basic pay (in which case only the latest change or revocation shall be effective), the change or revocation is not effective if it is made less than two years before the first day for which retired or retainer pay is granted. The elector may, however, before the first day for which retired or retainer pay is granted, change or revoke his election (provided the change does not increase the amount of the annuity elected) to reflect a change in the marital or dependency status of the member or his family that is caused by death, divorce, annulment, remarriage, or acquisition of a child, if such change or revocation of election is made within two years of such change in marital or dependency status.

"(d) If an election made under this section is found to be void for any reason except fraud or willful intent of the member making the

election, he may make a corrected election at any time within 90 days after he is notified in writing that the election is void. A corrected election made under this subsection is effective as of the date of the voided election it replaces."

d. **10 U.S.C., §1434:**

"**Kinds of annuities that may be elected.** (a) The annuity that a person is entitled to elect under section 1431 or 1432 of this title shall, in conformance with actuarial tables selected by the Board of Actuaries under section 1436 (a) of this title, be the amount specified by the elector at the time of the election, but not more than 50 per centum nor less than 12½ per centum of his retired or retainer pay, in no case less than $25. He may make the annuity payable—

(1) to, or on behalf of, the surviving spouse, ending when the spouse dies or, if the spouse remarries before age 60, when the spouse remarries;

(2) in equal shares to, or on behalf of, the surviving children eligible for the annuity at the time each payment is due, ending when there is no surviving eligible child; or

(2) to, or on behalf of, the surviving spouse, and after the death of that spouse or the remarriage of that spouse before age 60, in equal shares to, or on behalf of, the surviving eligible children, ending when there is no surviving eligible child. . . ."

e. **10 U.S.C.,§1440:**

"**Annuities not subject to legal process.** No annuity payable under this subchapter is assignable or subject to execution, levy, attachment, garnishment, or other legal process."

f. **10 U.S.C., §1447:**

"**Definitions.** In this chapter: (1) 'Plan' means the Survivor Benefit Plan established by this subchapter.

(2) 'Base amount' means—

(A) in the case of a person who dies after becoming entitled to retired or retainer pay, the amount of monthly retired or retainer pay to which the person—

"(i) was entitled when he became eligible for that pay; or

"(ii) later became entitled by being advanced on the retired list, performing active duty, or being transferred from the temporary disability retired list to the permanent disability retired list;

"(B) in the case of a person who would have become eligible for retired pay under chapter 67 of this title but for the fact that he died before becoming 60 years of age, the amount of monthly retired pay for which the person would have been eligible—

"(i) if he had been 60 years of age on the date of his death, for purposes of an annuity to become effective on the day after his death in accordance with a designation made under section 1448(e) of this title; or

"(ii) upon becoming 60 years of age (if he had lived to that age), for purposes of an

annuity to become effective on the 60th anniversary of his birth in accordance with a designation made under section 1448(e) of this title; or

"(C) any amount which is less than the amount otherwise applicable under clause (A) or (B) with respect to an annuity provided under the Plan and which is designated by the person providing the annuity on or before (i) the first day for which he becomes eligible for retired or retainer pay, in the case of a person providing an annuity by virtue of eligibility under Section 1448(a) (1) (A) of this title, or (ii) the end of the 90-day period beginning on the date on which he receives the notification required by section 1331(d) of this title that he has completed the years of service required for eligibility for retired pay under chapter 67 of this title, in the case of a person providing an annuity by virtue of eligibility under section 1448 (a) (1) (B) of this title, but not less than $300; as increased from time to time under section 1401a of this title.

(3) 'Widow' means the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay—

"(A) was married to him for at least one year immediately before his death; or

"(B) is the mother of issue by that marriage..."

g. **10 U.S.C., §1448:**

"**Application of plan.** (a) (1) The program established by this subchapter shall be known as the Survivor Benefit Plan. The following

persons are eligible to participate in the Plan:

"(A) Persons entitled to retired or retainer pay.

"(B) Persons who would be eligible for retired pay under chapter 67 of this title but for the fact that they are under 60 years of age.

(2) The plan applies—

(A) to a person who is eligible to participate in the Plan under paragraph (1) (A) and who is married or has a dependent child when he became entitled to retired or retainer pay, unless he elects not to participate in the Plan before the first day for which he is eligible for that pay; and

(B) to a person who (i) is eligible to participate in the Plan under paragraph (1) (B), (ii) is married or has a dependent child when he is notified under section 1331(d) of this title that he has completed the years of service required for eligibility for retired pay under chapter 67 of this title, and (iii) elects to participate in the Plan (and makes a designation under subsection (e) before the end of the 90-day period beginning on the date he receives such notification.

A person described in subclauses (i) and (ii) of cluase (B) who does not elect to participate in the Plan before the end of the 90-day period referred to in such clause shall remain eligible upon reaching 60 years of age and otherwise becoming entitled to retired pay, to participate in the Plan in accordance with eligibility under paragraph (1) (A).

(3) (A) If a person who is eligible under paragraph (1) (A) to participate in the Plan and who is married elects not to participate in the Plan at the maximum level, or elects to provide an annuity for a dependent child but not for his spouse, that person's spouse shall be notified of that election.

"(B) If a person who is eligible under paragraph (1) (B) to participate in the Plan and who is married does not elect to participate in the Plan at the maximum level, or elects to provide an annuity for a dependent child but not for his spouse, that person's spouse shall be notified of that action...."

h. **26 U.S.C., §61:**

"**Gross income defined.** (a) General Definition—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;

(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust."

i. **26 U.S.C., §71:**

"Alimony and separate maintenance payments. (a)

General rule.—

(1) Decree of divorce or separate maintenance. —If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

* * * * *

"(3) Decree of support. —If a wife is separated from her husband, the wife's gross income includes periodic payments (whether or not made at regular intervals) received by her after the date of the enactment of this title from her husband under a decree entered after March 1, 1954, requiring the husband to make the payments for her support or

maintenance. This paragraph shall not apply if the husband and wife make a single return jointly.

* * * * *

"(c) Principal sum paid in installments.—

(1) General rule. —For purposes of subsection (a), installment payments discharging a part of an obligation the principal sum of which is, either in terms of money or property, specified in the decree, instrument, or agreement shall not be treated as periodic payments.

(2) Where period for payment is more than 10 years. —If, by the terms of the decree, instrument, or agreement, the principal sum referred to in paragraph (1) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement, then (notwithstanding paragraph (1) the installment payments shall be treated as periodic payments for purposes of subsection (a)), but (in the case of any one taxable year of the wife) only to the extent of 10 percent of the principal sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received.

"(d) Rule for husband in case of transferred property. —The husband's gross income does not include amounts received which, under subsection (a), are (1) includible in the gross income of the wife, and (2) attributable to transferred property."

j. **42 U.S.C., §659:**

"Enforcement of individual's legal obligations to provide child support or make alimony payments — United States and District of Columbia to be subject to legal process.

(a) Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon renumeration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments. . ."

k. **42 U.S.C., §662:**

"**Definitions.** For purposes of section 659 of this title—

* * * * *

(c) The term 'alimony', when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also in-

cludes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

* * * * *

"(f) Entitlement of an individual to any money shall be deemed to be 'based upon remuneration for employment', if such money consists of'—

(1) compensation paid or payable for personal services of such individual, whether such compensation is denominated as wages, salary, commission, bonus, pay, or otherwise, and includes but is not limited to, severance pay, sick pay, and incentive pay, but does not include awards for making suggestions, or

(2) periodic benefits (including a periodic benefit as defined in section 428(h) (3) of this title) or other payments to such individual under the insurance system established by subchapter II of this chapter or any other system or fund established by the United States (as defined in subsection (a) of this section) which provides for payment of pensions, retirement or retired pay, annuities, dependents or survivors' benefits, or similar amounts payable on account of personal services performed by himself or any

other individual (not including any payment as compensation for death under any Federal program, any payment under any Federal program established to provide 'black lung' benefits, any payment by the Veterans' Administration as compensation for a service-connected disability or death, except any compensation paid by the Veterans' Administration to a former member of the Armed Forces who is in receipt of retired or retainer pay if such former member has waived a portion of his retired pay in order to receive such compensation), and does not consist of amounts paid, by way of reimbursement or otherwise, to such incurred by such individual in carrying out duties associated with his employment.

"(g) In determining the amount of any moneys due from, or payable by the United States to any individual, there shall be excluded amounts which—

(1) are owed by such individual to the United States,

(2) are required by law to be, and are, deducted from the remuneration or other payment involved, including but not limited to, Federal employment taxes, and fines and forfeitures ordered by court-martial,

(3) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and if amounts withheld are not greater than would be the case if such individual claimed all dependents to

which he was entitled (the withholding of additional amounts pursuant to section 3402 (i) of Title 26 may be permitted only when such individual presents evidence of a tax obligation which supports the additional withholding),

(4) are deducted as health insurance premiums,

(5) are deducted as normal retirement contributions (not including amounts deducted for supplementary coverage), or

(6) are deducted as normal life insurance premiums from salary or other remuneration for employment (not including amounts deducted for supplementary coverage)."

APPENDIX G

PETITIONER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT—EXCERPTS

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

IN RE THE MARRIAGE OF
RONALD C. MILLER,
Petitioner,
and
JANET C. MILLER,
Respondent.

PETITIONER'S, RONALD C. MILLER, PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

CAUSE NO. 84025-A

* *

FINDINGS OF FACT

* *

As of February 8, 1978, Mr. Miller's monthly military pension paid $1,190.70 gross. From this is deducted $92.15 per month which is paid to have the benefits payable to his wife on his death. The tax is $98.64 per month. With these two deductions, the monthly net military pay is $1,000.11 per month.

As stated above, Mr. Miller was in the service four and one-half years before he married Mrs. Miller. He had thus earned 22.5% of his future military pen-

sion before they were married.

Mr. Miller remarried March 24, 1978. Under the applicable federal law, his former wife, JANET C. MILLER, is not entitled to any benefits under the military pension plan once she was divorced from Mr. Miller. Mr. Miller's present wife will become eligible to receive the military pension upon his death after they have been married one year. Thus, insofar as any future benefits that accrue on the death of Mr. Miller relating to his military pension, JANET C. MILLER has no legal rights.

* *

The military pension of Mr. Miller was earned solely by his efforts. He jeopardized his life for 100 missions in Vietnam as part of his efforts to earn this pension. He incurred daily risks whenever he flew during his military career. He could become ill or disabled and unable to earn an additional income and his military retirement would be his only source of income. This would exclude any social security benefits if he were eligible if such an event occurred. Mrs. Miller has no right, title or interest in the military pension of Mr. Miller. No award should be made to her of any of this fund. If he were to die before he has been married a year, his present wife would get no part of this pension. If he died any time after they had been married a year, the present Mrs. Miller would get the pension. On his death, the only asset would be the military pension. But this would be the property of the present Mrs. Miller and not an asset of his estate.

APPENDIX H

PETITIONER'S POST TRIAL MOTIONS—EXCERPTS

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

IN RE THE MARRIAGE OF:
RONALD C. MILLER,
Petitioner,
and
JANET C. MILLER,
Respondent.

CAUSE NO. 84025-A

(1) *MOTION TO AMMEND FINDINGS PURSUANT TO RULE 52 (b), M.R. Civ. P.;*
(2) *MOTION TO MAKE ADDITIONAL FINDINGS PURSUANT TO RULE 52 (b), M.R. Civ. P.;*
(3) *MOTION TO AMEND THE JUDGEMENT PURSUANT TO RULE 52 (b), M.R. Civ. P.; and*
(4) *MOTION TO ALTER OR AMEND THE JUDGMENT PURSUANT TO RULE 59 (g), M.R. Civ. P.*

The Petitioner, RONALD C. MILLER, moves the Court for its Order as follows:

* *

To make as an additional Finding of Fact that the sum of NINETY-EIGHT AND 64/100 DOLLARS ($98.64)

per month is deducted in Federal tax from Mr. Miller's monthly pension of $1,190.70. In addition, there are State taxes that have to be paid on the income derived from the military pension by Mr. Miller.

* *

To make as an additional Finding of Fact Paragraphs 31 and 32 of Petitioner's Proposed Findings, in toto, which appear on Page 19, lines 25 to Page 22, line 5, to-wit:

"Respondent's Exhibit H purports to show the present value of the military pension. The combined totals show $442,307.00 for Mr. Miller's life expectancy and JANET C. MILLER'S life expectancy after the death of Mr. Miller. This ASSUMES the parties who are now divorced, would have remained married until the death of Mr. Miller at which point Mrs. Miller would receive potentially $54,356.00. Obviously this ASSUMPTION is unreasonable because they are now divorced.

"Exhibit 'H' also refers to Mrs. Millers receiving $654.89 per month for 36.5 years, her life expectancy, if she were to get the sum each month from the date of their divorce on February 8, 1978. This would total $286,842.00. This is one-half of the military pension. Mrs. Miller also sought $600 per month pending a decision in this matter. This figure is meaningless because it is based on several erroneous assumptions:

(a) The first erroneous assumption is that Mrs. Miller is the "surviving" party and entitled to that sum on the death of Mr. Miller. Mrs. Miller, now divorced, is not a "surviving" party.

(b) The second erroneous assumption is the $286,842.00 is not presently existent. This is the sum generated over her life expectancy of 36.5 years. The only present monthly sum is the gross amount of $1,092.82. Mr. Miller does not have, cash in hand $286,842.00.

(c) The third erroneous assumption is that this sum would be paid regardless of the death of Mr. Miller. With the divorce, JANET C. MILLER has no claim to the pension on the death of Mr. Miller. An award of this sum would be meaningless because future military pension payments would go to the present Mrs. Miller if he died at any time after they had been married one year.

"The reduction to present value assumes a constant factor of 6%. That the discount rate and inflation will always total 6%. It simplifies matters to say the discount rate and inflation will total 6%. But this is pure speculation. There are lower total figures when the discount is 6% and inflation is zero, i.e., $181,357.00 but these figures are again speculation and there are presently no such sums available to Mr. Miller.

"The principal fallacy of this exhibit is that there are no present funds on hand to generate the $387,591.00, $292,651.00, $227,243.00, or $181,357.00, when various discounts are used. This formula is presented in damage award litigation when the jury or court must arrive at the present value of the damages before an award is a lump sum *due now*. It is a total money judgment that can be collected *now* by the injured litigant. However, in this case there is and cannot be an

award of $286,842.00 or $116,233.00 to Mrs. Miller because there is no assurance Mr. Miller will live 355 months, his life expectancy. Further, there is no assurance Mrs. Miller will live 36.5 years to collect that sum. Since Mrs. Miller has no legal survivor's benefits due to the divorce, the death of Mr. Miller at any time would eliminate her claim to one-half of the pension funds.

"Exhibit "H" is meaningless when applied to the military pension. It is simply a multiplication of the pension times the life expectancy of the parties. It is totally unrelated to the practical aspects of the case which is that there is only a monthly income involved, not a lump sum. If a lump sum were awarded, this would be a judgment lien on Mr. Miller's house. It would subject his salary to be levied upon to satisfy the judgment. It would forever disable him from borrowing any funds due to the judgment.

"In this day and age of social program, government aid, high taxes, an individual with initiative is continually penalized. The less one works the more one expects for nothing. Why should Mr. Miller continue to work at the bank when his former wife decided to go to college for another college degree? Why shouldn't Mr. Miller quit the bank and live on his military pension? If he continues to work at the bank, his former wife will say he has two incomes and I have none - because he has two incomes he can pay me one-half or $600.00 a month, regardless of whether it comes from the bank or his military pay. The short answer to this is let Mrs. Miller go out an earn a living like the rest of the people who produce in-

comes. Fancy figures of $286,842.00 or $116,233.00 support only the fantasy of those who are idle and prefer two more years of college life rather than to produce a taxable income."

* *

To make the following as an additional Finding of Fact:

The military pension of Mr. Miller is not marital property subject to division by the Court. A military pension has no true property characteristics in that it cannot be sold, transferred, conveyed, or pledged and it terminates on the death of the retired party. Since it is not property, it is not a divisible asset that can be apportioned between parties. A division of a military pension as marital property would not be alimony. An attempted division of a military pension as marital property cannot be enforced by legal process under 42 U.S.C., Sec. 659. A military pension is only a resource that may be considered by the Court on the issue of maintenance. The military pension was not acquired by the joint or team efforts of the parties but was solely attributable to the efforts and ability of Mr. Miller. The wife's contribution of a homemaker, regardless of what value was to be assigned to it, was not a contribution to Mr. Miller being able to acquire the military pension.

* *

To make the following as an additional CONCLUSION Of LAW:

Mr. Miller was an R.O.T.C. Officer who retired after twenty years (10 U.S.C., Sec. 8911) with his

retirement pay computed under 10 U.S.C., Sec. 1401-1406. A widow of a retired military person is not entitled to benefits unless her husband has elected to pay a specific sum each month for his eligible survivors to benefit from the retirement pay. 10 U.S.C., Sec. 1447-1455 provides for a Survivor Benefit Plan. Mr. Miller pays into this plan. A "widow" is eligible under this plan and includes a wife married at least one year to him immediately prior to his death. Children under 18 years are eligible or those between 18-22 attending college (Sec. 1447). The annuity is payable to the widow while she is living. If she remarries before age 60, the annuity is cut off. The Annuity also ceases with her death. The monthly annuity to the widow is 55% of the retired pay including periodic raises (Sec. 1451 (b)). The Congress has made absolutely no provision for an ex-wife to participate in her husband's military pension. 42 U.S.C. 659 subjects monies owed by the Federal government to individuals to be subject to execution for alimony and child support. The 1977 Enactment of Public Law 95-30, Section 501 (d) , 91 Stat. 160, adding Sec. 462 (c), to be codified as 42 U.S.C., §662 (c) provided that alimony "does not include any payments or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses."

In 1972 the Congress refused to allow the attachment of a retired military person's pay to ". . . comply with the order of a court of competent jurisdiction in favor of a spouse, former spouse or children . . ." (Cong. Rec. Senate, September 8, 1972, p. 29805-29812, at Page 29809. The House concurred, Cong. Rec.

House, September 12, 1972, p. 30148-30151).

Congress has pre-empted the field of retired military pay. Article VI, Clause Two of the United States Constitution is the supremacy clause which gives Congress the preemption right where it has acted. For a State Court to award a percentage of the military pay as "marital property" would be an intrusion into a preemptive Federal law on military pensions. (See the dissent in *Ramsey v. Ramsey*, 535 P. 2d 53 (Idaho); *Wissner v. Wissner*, 338 U.S. 655; *Free v. Blond*, 369 U.S. 663; *Yiatchos v. Yiatchos*, 376 U.S. 306).

The right to receive retirement pay from the armed forces is not personal property. Retirement pay is not a fixed or tangible asset. It has no cash surrender, loan, redemption or lump sum value. It terminates upon death. *(In re Marriage of Ellis*, 538 P. 2d 1347 (Colo. 1975), and 552 P. 2d 506 (1976) apd.; *Finney v. Finney*, 537 S.W. 2d 367 (Ark. 1976).).

Prior to and subsequent to the Uniform Marriage and Divorce Act, Montana was not and is not now a community property State *(Cook v. Cook*, 159 Mont. 98, 103-104, 495 P. 2d 591 (1972).). A community property state treats property acquired during the marriage as the property of husband and wife as partners (5 Pepperdine Law Review 191, 205, Note 48).

In California, a community property state, the heirs of the ex-wife are not entitled to the portion of the retirement benefits the ex-wife would have received had she lived *(Fithian v. Fithian*, 517 P. 2d 449, 455).

If a district Court in Montana were to regard a military pension as marital property and award the ex-wife a percentage of the pension, e.g., 38.5 percent,

and require that percentage to be paid to the ex-wife, and upon her death to the heirs, and then her heirs could bequeath the percentage as they saw fit, with the percentage of 38.5 to continue as long as the ex-husband were alive, the benefits would:

(a) be payable to a person not authorized by Congress to receive the benefits, e.g., an ex-wife, or any of her heirs or any of her heirs' heirs. This could result in the percentages taking on the appearance of an oil royalty divivion, e.g., 1/10th, 1/8th, etc.

(b) allow benefits to be received by an ex-wife even though she remarries because being marital property, her remarriage would not affect the property division by state law because it is not alimony. This would oppose the Congressional limitation that benefits are cut off to a widow who remarried before age 60.

(c) allow benefits to be received by the heirs of the ex-wife, the heirs' heirs ad infinitum, until the death of the ex-husband. This would oppose the Congressional limitation that benefits to a widow cease on her death and do not extend to her heirs, exclusive of her children past 18 who attend school.

The military pension of Mr. Miller is not marital property subject to division by this Court. The military pension was not acquired by the joint efforts of the parties. Even if the pension were regarded as being acquired by the joint efforts of the parties, the pension is not marital property subject to division by the Court. The military pension belongs exclusively to Mr. Miller. The military pension can be considered as a resource only on the issue of maintenance. *Eschenburg v.*

Eschenburg, 33 St. Rep. 1198. did not consider whether a military pension was marital property but only concluded it was a resource to be considered on the issue of maintenance.

The Respondent cannot be awarded a percentage of the military pension of the Petitioner in that it is not marital property subject to division by a State Court. The Congress having pre-empted the field of military retirement pay, and made no provision for an ex-wife to share in that pay, a State Court has no authority to make a division of the military pay.

* *

In the event the Court declines to amend its Findings of Fact and Conclusions of Law on the military pension, without waiving all of the proposed deletions and amendments, the Petitioner submits the Court amend its Conclusion of Law 4 (k) and 4 (f) which relate to the Petitioner's and Respondent's interest in the military pension by making the following amendment:

> "The Respondent shall pay 38.5 percent of the State and Federal Tax assessed to the Petitioner on his military pension from and after the date of this judgment. The State and Federal taxes that are to be paid on the Respondent's 38.5 share shall be deducting by reducing the gross amount by the amount of State and Federal taxes which the Petitioner would have to pay if the retirement pay were his only income and he claimed two exemptions. If the Petitioner is ruled exempt from Federal and State Income taxes on the portion of retirement payments awarded to the Respondent, or if the Respondent can be taxed directly on the

same, then the reduction will not be allowed. If this reduction were not provided for in some manner, then the Petitioner would be paying tax on the 38.5 percent awarded to the Respondent."

APPENDIX I

SPECIFICATION OF ERRORS IN PETITIONER'S BRIEF TO THE MONTANA SUPREME COURT—EXCERPTS

The questions presented by Appellant herein may be subsumed under two main headings.

1. Did the Trial Court err in awarding to Respondent 38.5 percent of Petitioner's monthly military pension?

Under this general issue may be grouped certain questions:

A. Is such a pension a "property interest" which is the subject of a division of marital assets?

B. Does the Court have the power to make such an award?

C. Does the doctrine of Federal Preemption of the Field apply? (Article VI of the Constitution for the United States of America).

D. Are the provisions of paragraph 4 of the Trial Court's Conclusions of Law (Findings, etc., p. 11, lines 11-20) in error?

APPENDIX J

May—June 1980 — Volume XXIV, Issue 3

ARMY ECHOES

Test program begins for recall to active duty

Approval for a retiree mobilization test program has been granted. Beginning in May, 1980 about 865 Regular Army retirees will receive preassignment letters and orders directing them to report to the installation commander for active duty in the event of a national emergency. They will be slated for assignment to garrisons and hospitals as follows:

- 351 positions at Ft. Benning, Georgia
- 148 positions at Ft. Carson, Colorado,
- 88 positions at Ft. Riley, Kansas, and
- 278 positions at Ft. Lewis, Washington.

A voluntary recall program will be conducted at Forts Carson and Riley shortly after the mandatory program begins. Two lists will be sent to the installations having both programs. Preassigned retirees will be one list and unassigned retirees living within 300 miles of the installation on the other. Those not earmarked for preassignment can be contacted by the installation to see if they desire to volunteer.

Expanded program

After evaluation and modification of the pilot phase, the program will be expanded to include all Army installations in the contiguous 48 states. This will begin in early 1981. A technical difficulty has prevented the retirees in Alaska and Hawaii from being included in the data base, however, they will be added as soon as possible.

About 82,000 Regular Army retirees have been identified and placed in Category I. The data base will eventually include an additional 130,000 Regular Army personnel in Category II.

About 70% of those participating in the pilot program will come from within 300 miles of the installations mentioned above. However, some recalled may reside anywhere in the 48 contiguous states if they are selected to fill requirements at the pilot program installations because there are no unfilled requirements closer to their homes which they could meet. At the present time only positions at installations in the continental United States are being reviewed to determine possible requirements for retirees.

Purpose of program

The recall program, under development for two years, is designed to be used for military assignment during full mobilization. It will allow the Army to deploy younger soldiers, and staff the resultant vacant positions with retirees. Although the Army has so far been able to keep the active Army components at or near authorized strength, significant shortages of personnel have developed in the Reserve Components. There are not enough trained people to meet mobilization and war-fighting needs. The Army had to make plans to alleviate the possible impact this shortage may have, and retired personnel provide a large number of skilled military personnel who could be of great value, if required.

In case you missed the last issue of Army Echoes, the age and grade criteria and category definitions are reprinted here. The limits being used for age are: age 64 for general officer; 62 for warrant officers; 60 for all others. It should be mentioned that recall of retired

General Officers will be managed on a personal case by case basis by the Army Chief of Staff. Age limits are of comparatively lesser significance for general officers than for other categories of potential recalls.

Category I Regular Army retirees are those who meet the age and grade criteria, were not retired for permanent disability, have a CONUS address and have been retired for les than five years. Category II Regular Army retirees meet the same qualification as above, but they have been retired for more than five years. Category III includes all other retirees, including those who were retired for a permanently disqualifying disability or who became disabled after retirement. Total personnel available in Categories I and II are estimated over 200,000. There are no plans to develop mobilization data on Category III personnel at this time.